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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 JEFFREY M. BARSHAW, and CINDY
7 WIERSMA-BARSHAW as individuals and
8 as a marital community,

9 Plaintiffs,

10 v.

11 PILGRIMS PRIDE COMPANY et al.,

12 Defendants.

13 Case No. C22-1673RSM

14 ORDER DENYING MOTION FOR
15 SUMMARY JUDGMENT ON
16 AFFIRMATIVE DEFENSE

17 **I. INTRODUCTION**

18 This case comes before the Court on Plaintiffs’ “Motion for Order on Summary
19 Judgment Dismissing the Affirmative Defense of Failure to Mitigate.” Dkt. #15. Defendant
20 Pilgrims Pride Company (“Pilgrims”) has filed an opposition. Dkt. #18. The Court has
determined that it can rule on this issue without oral argument. For the following reasons, the
Court DENIES Plaintiffs’ Motion.

21 **II. BACKGROUND**

22 On November 6, 2019, Plaintiff Jeffrey Barshaw purchased a box of frozen “Country
23 Post” brand chicken, manufactured by Defendant Pilgrims. Dkt. #1-3; Dkt. #16 (“Barshaw
24 Decl.”), ¶ 3.

25 He returned home, opened one of the sealed bags of frozen chicken, reached in, and had
26 his palm pierced by a pair of metal shears inside the bag. *Id.*

1 He called his mom, who told him to go to a hospital. Dkt. #16 at ¶ 4. He went to urgent
 2 care, where he says his hand was “wrapped,” he was advised that he had a nerve injury and that
 3 they could not treat it further, and that “if the problem persisted, I should seek medical attention
 4 from the emergency department.” *Id.*

5 The next day he saw a doctor. She consulted with a hand surgeon who recommended
 6 that Mr. Barshaw go to the emergency room if his symptoms worsened or persisted. *Id.* at 6.
 7 On November 11, 2019, after his hand “became red, irritated and increasingly painful” he went
 8 to the emergency room. *Id.* at 7. Hand surgery followed. *Id.* at 10.

9 This case was filed in King County Superior Court on February 8, 2022. Dkt. #1-3.
 10 Plaintiffs alleged Defendants’ actions were negligent and violated several other laws including
 11 the Washington Products Liability Law, RCW 7.72 et seq. *Id.* The case was removed to this
 12 Court on November 22, 2022. Prior to removal, the state court found Pilgrims liable under
 13 RCW 7.72. As a result, the parties agree that trial will address damages only. Dkt. #12 at 2.

14 Pilgrims filed an Answer with 47 affirmative defenses, including one for failure to
 15 mitigate. Dkt. #15 at 2. Plaintiffs now move for summary judgment dismissal of that
 16 affirmative defense only. Dkt. #15.

20 III. DISCUSSION

21 A. Legal Standard for Summary Judgment

22 Summary judgment is appropriate where “the movant shows that there is no genuine
 23 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
 24 R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are
 25 those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at
 26 248. In ruling on summary judgment, a court does not weigh evidence to determine the truth of
 27 28

1 the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco,*
 2 *Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny &*
 3 *Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

4 On a motion for summary judgment, the court views the evidence and draws inferences
 5 in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S.*
 6 *Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable
 7 inferences in favor of the non-moving party. *See O’Melveny & Meyers*, 969 F.2d at 747, *rev’d*
 8 *on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient
 9 showing on an essential element of her case with respect to which she has the burden of proof”
 10 to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

13 **B. Analysis**

14 Plaintiffs cite a declaration of Mr. Barshaw and ask the Court “to find that there is no
 15 genuine issue of material fact whether Barshaw acted reasonably following his injury....
 16 [because] he followed the advice of his health care providers and sought surgery at the earliest
 17 available opportunity.” Dkt. #15 at 2. Plaintiffs point to the Washington Pattern Instructions
 18 for avoidable consequences, which discuss the “failure of the injured person to exercise
 19 ordinary care to avoid or minimize such new or increased damage,” and which urge the jury to
 20 consider “the nature of the treatment, the probability of success of such treatment, the risk
 21 involved in such treatment, and all of the surrounding circumstances.” *Id.* at 5 (citing WPI
 22 33.01 and WPI 33.02).

23 Pilgrims rebut Mr. Barshaw’s declaration with citations to the medical records. For
 24 example, the record for Mr. Barshaw’s initial urgent care visit states “I recommend patient go to
 25 Swedish Mill Creek ER for further evaluation of his wound and treatment.... ER notification
 26

made to the ER.” Dkt. #19-1 at 6. At Mr. Barshaw’s next medical appointment, the records state the patient “[w]ent to [urgent care], was told to go to ER but he didn’t. He went home instead.” Dkt. #19-2 at 3. Pilgrims also cites to testimony from its expert witness.

On Reply, Plaintiffs point out that Mr. Barshaw may have avoided the emergency room due to financial considerations. Dkt. #21 at 7–8.

The medical records appear to contradict Plaintiff’s version of events. Did he decline to follow medical advice? Was that reasonable? Whether this is a flat contradiction or otherwise is up to the jury. The issue at hand is failure to mitigate. Delaying an ER visit is obviously material given the subsequent exacerbation of Mr. Barshaw’s injury. The Court must draw all reasonable inferences in favor of the non-moving party. Pilgrims does not need to submit expert testimony to the Court to prove anything at this stage in the litigation. Because there is a genuine dispute of material fact, summary judgment cannot be granted. The Court cannot rule as a matter of law that his actions were reasonable because he felt he could not afford a trip to the emergency room. Whether or not Mr. Barshaw failed to mitigate his damages is an issue of fact for the jury.

IV. CONCLUSION

Having reviewed the relevant briefing and the remainder of the record, the Court hereby finds and ORDERS that Plaintiffs’ “Motion for Order on Summary Judgment Dismissing the Affirmative Defense of Failure to Mitigate,” Dkt. #15, is DENIED.

DATED this 25th day of April, 2023.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE